STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: APRIL 13, 2023

IN THE MATTER OF:
Appeal Board No. 627935

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination, holding, effective July 4, 2022, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10). The

claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed January 20, 2023 (), the Administrative Law Judge denied the employer's application to reopen A.L.J. Case No. 022-21716 and in so doing, continued in effect its prior decision, which overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The employer is a municipal school district. The employer's Sub-Central unit, which handles the hiring and placement of its substitutes, employs approximately sixteen individuals, three of whom have first-hand knowledge and the training necessary to participate at Unemployment Insurance hearings.

The claimant worked for the employer, the municipal school district, as a per diem substitute teacher during the 2021 through 2022 school year. The claimant applied for and was denied unemployment insurance benefits, effective July 4, 2022.

The claimant requested an unemployment insurance hearing. A hearing in A.L.J. Case No. 022-21716 was scheduled on September 22, 2022, at 2:00 pm, by notice dated September 8, 2022. There were four other reasonable assurance hearings scheduled for that same date and time. Only two of the employer's three witnesses, trained on reasonable assurance, were available to participate. As a result, the employer requested a postponement of the hearing, by letter dated September 19, 2022. The postponement was denied. A decision in favor of the claimant was then mailed and filed on September 23, 2022. The employer sought reopening of the decision, by letter dated October 13, 2022.

OPINION: Pursuant to 12 NYCRR § 463.2 (h), the Board, on its own motion or on

application duly made to it, in its discretion, may excuse a default of a party at any stage of a case or appeal. A party who shows good cause for the default shall be entitled to consideration of the case or appeal as if no default had occurred.

The credible evidence establishes that the employer did not appear at the initial hearing because the employer had no additional first-hand witnesses available to participate in the remainder of the hearings on that date. We distinguish Appeal Board No. 592302 from the circumstances herein. In so doing, we note that, in Appeal Board No. 592302, the employer, the Department of Education, had objected to the claimant's entitlement, had requested a hearing as to the claimant's potential receipt of benefits, and had then absented itself from two scheduled hearings, without advance notice to the Department of Labor and to the detriment of the claimant who had missed a day of work to appear at the second hearing. (Appeal Board No. 592302) In the case herein, however, the claimant had requested the initial hearing, was required to appear and the case proceeded in the employer's absence. The employer was the respondent. We note too, that the employer, herein, did notify the Department of Labor, in advance of the initial hearing, of its need for a postponement. After the postponement was denied and the hearing decision was rendered, the employer then requested a reopening and was present at the subsequent hearing along with the claimant. Hence, we find that, unlike the

circumstances of Appeal Board No. 592302, the employer has demonstrated good cause for its absence from the initial hearing, has sought reopening within a timely fashion and is therefore entitled to a decision on the merits.

Our review of the record, however, reveals that the case should be remanded to hold a further hearing regarding whether the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10).

At the further hearing, the parties will provide additional testimony and evidence regarding the claimant's employment as a per-diem substitute teacher during the 2021-2022 school year and whether the claimant had reasonable assurance of continued employment in the 2022-2023 school year. The Judge will take all testimony and evidence necessary to complete the record.

DECISION: The decision of the Administrative Law Judge, insofar as it denied the employer's application to

reopen 022-21716, is reversed.

The employer's application to reopen 022-21716 is granted.

The decision of the Administrative Law Judge, insofar as it overruled the initial determination, holding, effective July 4, 2022, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10), is rescinded.

Now, based on all the foregoing, it is

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issue of reasonable assurance, only, upon due notice to all parties and their representatives; and it is further

ORDERED, that the Notice of Hearing shall identify as the Purpose of Hearing

the remanded issue of reasonable assurance, only; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and so that at the end of the hearing all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the remanded issue only, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

MARILYN P. O'MARA, MEMBER